SEP 11 1972

MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1369

RUSSELL G. OSWALD, Commissioner of Correctional Services; PAUL J. REGAN, Chairman of the Board of Parole; J. EDWIN LA VALLEE, Superintendent of Clinton Correctional Facility; JOHN T. DEEGAN, Superintendent of Auburn Correctional Facility; NEW YORK STATE BOARD OF PAROLE; and the NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,

Petitioners,

against

EUGENE RODRIGUEZ, MICHAEL KATZOFF and JOHN KRITSKY,

Respondents.

BRIEF FOR PETITIONERS

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioners
80 Centre Street
New York, New York 10013
212-488-6044

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

LILLIAN Z. COHEN
Assistant Attorney General
of Counsel

TABLE OF CONTENTS

	PAGE
Opinions and Orders Below	1
Jurisdiction	2
Question Presented	2
Statutes	2
Statement	5
The *In Banc* Opinions	10
Summary of Argument	16
POINT I—The habeas corpus statute is specifically applicable to state prisoners and tailored to their litigation needs. That statute—and not the inmate or local federal court—should determine how their claims relating to confinement are reviewed, particularly since the habeas corpus remedy respects the valid concerns of the state in reviewing all prisoner claims	18
A. If state prisoners may ignore the habeas corpus remedy and bring their claims regarding confinement directly to the federal courts under the Civil Rights Act, they have the power of unilaterally overriding the State's interest in first reviewing such claims	25
B. The state prisoner who proceeds under the Civil Rights Act in order to escape application of the exhaustion requirement sacrifices the protections available to him under the habeas corpus statute	35
POINT II—Respondents have failed to exhaust their available and adequate State Court remedies	41
Exhibit "A"	1a
Exhibit "B"	4a

Cases Cited

PAGE

Appalachian Volunteers, Inc. v. *Clark*, 432 F.2d 530 (6th Cir. 1970), cert. denied 401 U.S. 939 (1971) 30

Bivens v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) 35

Brabson v. *Wilkins*, 19 N.Y. 2d 449 (1971) 46

Brooks v. *Wainwright*, 428 F.2d 652 (5th Cir. 1970) 34

Carafas v. *La Vallee*, 391 U.S. 234 (1968) 17, 19

Carothers v. *Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970) 25

Coffin v. *Reichard*, 143 F.2d 443 (6th Cir. 1944) 21

Cupp v. *Swenson*, 288 F. Supp. (W.D. Mo. 1968) 31

Daugherty v. *Craven*, 422 F.2d 7 (9th Cir.), cert. denied 397 U.S. 964 (1970) 21

Douglas v. *Sigler*, 386 F.2d 684 (8th Cir. 1967) 25

Dowd v. *United States ex rel. Cook*, 340 U.S. 206 (1951) 19

Edwards v. *Schmidt*, 321 F. Supp. 68 (D.C. Wis. 1971) 26, 28

Ex Parte Kieffer, 40 F. 399 (C.C.D. Kan. 1889) 45

Ex Parte Royall, 117 U.S. 241 (1886) 26, 27

Fay v. *Noia*, 372 U.S. 391 (1963) 22

Gaito v. *Ellenbogen*, 425 F.2d 845 (3d Cir. 1970) 39

Gomez v. *Miller*, 341 F. Supp. 323 (S.D.N.Y. 1972), jurisdictional statement filed sub nom. *Miller* v. *Gomez*, 41 U.S.L.W. 3102 ..... 20, 24

Grayson v. *Montgomery*, 421 F.2d 1306 (1st Cir. 1970) 22

Hanvey v. *Pinto*, 441 F.2d 1154 (3d Cir. 1971) 34

Harris v. *Nelson*, 394 U.S. 286 (1969) 37, 38

PAGE

Hall v. Garner, 309 F. Supp. 362 (E.D. Ark. 1970) ... 25

Howard v. Swenson, 426 F.2d 277 (8th Cir. 1970) 34

Ilas v. Ellis, 264 F. Supp. 185 (S.D. Ind. 1967) 45

In re Ferguson, 361 P.2d 417 (1961) 28

In re Harrell, 470 P.2d 640 (1970) 28

In re Riddle, 372 P.2d 304 (1962) 28

Jackson v. Denno, 378 U.S. 368 (1964) 47

Jackson v. Hendrick, —— D. and C. 2d—— (Ct. of Com. Pleas, Phila. Co., April 7, 1972), 40 U.S.L.W. 2710 (May 2, 1972) 29

Jones v. Headly, 410 F.2d 325 (5th Cir. 1969) 39

Johnson v. Avery, 393 U.S. 483 (1969) 20

Johnson v. Avery, 252 F.Supp. 783 (M.D. Tenn. 1966) 23, 24, 25

Johnson v. Walker, 317 F.2d 418 (5th Cir. 1963) 39

Jones v. Cunningham, 371 U.S. 236 (1963) 17, 19

Jones v. Decker, 436 F.2d 955 (5th Cir. 1970) 19, 24

King v. McGinnis, 289 F.Supp. 466 (S.D.N.Y. 1968) .. 34

Kritsky and United States ex rel. Kritsky v. McGinnis, 313 F.Supp. 1247 (N.D.N.Y. 1970) 2

Lambert v. Department of Corrections, —— F.Supp. ——, Civil No. 71-1185 (D.C.S.C. April 12, 1972) 29

Landman v. Royster, 333 F.Supp. 621 (E.D. Va. 1971) 20, 25, 34

Light v. United States, 430 F.2d 932 (5th Cir. 1970) 32

Lloyd v. Heritage, 199 F.Supp. 46 (N.D. Ga. 1961) 32

Marcellin v. Scott, 33 A.D.2d 588 (3d Dept. 1969) 30, 42

Marcucci v. Mancusi, 443 F.2d 921 (2d Cir. 1970) 25

PAGE

Matter of Brown v. *McGinnis*, 10 N.Y. 2d 531 (1962) ..42, 46

McKinney v. *Taylor*, 344 F.2d 854 (10th Cir. 1965) 32

Minnesota v. *Brundage*, 180 U.S. 499 (1901) 45

Mitchell v. *Schoonfield*, 285 F. Supp. 728 (D.C. Md. 1968) 43, 45

Morris v. *Travisono*, 310 F.Supp. 857 (D.R.I. 1970) .. 31

Morris v. *Wingo*, 421 F. 2d 651 (6th Cir. 1970) 21

Morrisey v. *Brewer*, —— U.S. ——, 92 S.Ct. 2593 (1972) 21

Muniz v. *United States*, 374 U.S. 150 (1963) 41

Murphy v. *Turner*, 526 F.2d 422 (10th Cir. 1970) 21

Negrich v. *Hohn*, 246 F.Supp. 173 (W.D. Pa. 1965) .. 40

Nelson v. *George*, 399 U.S. 224 (1970) 20

Paden v. *United States*, 430 F.2d 882 (5th Cir. 1970) .. 32

People v. *Bonino*, 1 N.Y. 2d 752 (1956) 47

People v. *Cornish*, 21 A.D. 2d 280 (1st Dept. 1964) 47

People v. *Huntley*, 15 N.Y. 2d 72 (1965) 47

People v. *Ressler*, 17 N.Y. 2d 174 (1966) 47

People ex rel. Brown v. *Johnston*, 9 N.Y. 2d 482 (1961) 46

People ex rel. Keitt v. *McMann*, 18 N.Y. 2d 257 (1966) . 42

People ex rel. Menechino v. *Warden*, 27 N.Y. 2d 449 (1971) 46

Peyton v. *Rowe*, 391 U.S. 54 (1968) 20, 35

Picard v. *Connor*, 404 U.S. 270 (1971) 16, 41

Pierce v. *La Vallee*, 293 F.2d 233 (2d Cir. 1961) 25

Potwora v. *Dillon*, 386 F.2d 74 (2d Cir. 1967) 39

PAGE

Powell v. *Hunter*, 172 F.2d 331 (10th Cir. 1949) 32

Rodriguez and United States ex rel. Rodriguez v. *McGinnis*, 456 F.2d 79 (2d Cir. 1972) (in banc) .. 1

Rodriguez and United States ex rel. Rodriguez v. *McGinnis*, 451 F.2d 730 (2d Cir. 1971) 1

Rodriguez and United States ex rel. Rodriguez v. *McGinnis*, 307 F. Supp. 627 (N.D.N.Y. 1969) 1

Sellers v. *Department of Corrections*, —— F. Supp. ——, Civil No. 71—1161 (D.C.S.C. March 28, 1972) 29

Shaw v. *McGinnis*, 14 N.Y.2d 864 (1964) 42

Smartt v. *Avery*, 411 F.2d 408 (6th Cir. 1969) 21, 24

Smoake v. *Willingham*, 359 F.2d 386 (10th Cir. 1966)..32, 45

Sostre v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971) (in banc), cert. denied sub nom. *Oswald* v. *Sostre*, 404 U.S. 1049 (1972) 24, 31

State ex rel. Thomas v. *State*, 198 N.W. 2d 675 (Sup. Ct. Wis. 1972) 29

Strowder v. *Shovlin*, 380 F.2d 370 (3d Cir. 1967) 20

Sullivan v. *Ciccone*, 311 F. Supp. 456 (W.D. Mo. 1970) 32

Townsend v. *Sain*, 372 U.S. 293 (1963) 37

United States v. *Marchese*, 341 F.2d 782 (9th Cir. 1965) 25

United States ex rel. Caminito v. *Murphy*, 222 F.2d 698 (2d Cir. 1955) 47

United States ex rel. Campbell v. *Pate*, 401 F.2d 55 (7th Cir. 1969) 24

United States ex rel. Hetenyi v. *Wilkins*, 348 F.2d 844 (2d Cir. 1965), cert. denied sub nom. *Mancusi* v. *Hetenyi*, 383 U.S. 913 47

PAGE

United States ex rel. Katzoff v. *McGinnis*, 441 F.2d 558 (2d Cir. 1971) 2

United States ex rel. LaNear v. *LaVallee*, 306 F.2d 417 (2d Cir. 1962) 47

United States ex rel. Meadows v. *New York*, 426 F.2d 1176 (2d Cir. 1970) 30

United States ex rel. Schuster v. *Herold*, 410 F.2d 1071 (2d Cir. 1969), cert. denied 396 U.S. 847 .....20, 24

United States ex rel. Stuart v. *Yeager*, 293 F.Supp. 1079 (D.C.N.J. 1968) 34

United States ex rel. Weyrauch v. *Parker*, 268 F.Supp. 785 (M.D. Pa. 1965) 32, 45

United States ex rel. Zevin v. *Cahn*, 282 F.Supp. 275 (E.D.N.Y. 1968) 45

Westberry v. *Fisher*, 309 F. Supp. 12 (S.D. Me. 1970) 40

Wilwording v. *Swenson*, 404 U.S. 249 (1971) 17, 18, 22, 23, 26, 42

Wilwording v. *Swenson*, 439 F.2d 1331 (8th Cir. 1971) 34

Wright v. *McMann*, 387 F.2d 519 (2d Cir. 1967) ...25, 30, 33, 39, 40

Wright v. *McMann*, 321 F.Supp. 127 (N.D.N.Y. 1970), aff'd. in part, rev'd. in part, 460 F.2d 126 (2d Cir. 1972) 32

Younger v. *Harris*, 401 U.S. 37 (1971) 25, 27

STATUTES AND REGULATIONS CITED

18 U.S.C. § 4161 32

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2241 2

28 U.S.C. § 2243 .....3, 16

PAGE

28 U.S.C. § 2254 ..... 4, 16, 18, 23, 36, 41, 43

42 U.S.C. § 1983 ..... 5, 16, 33

Fed. R. Civ. Pro. 26-37 37

N.Y. Correction Law § 236 5

N.Y. Civil Practice Law and Rules, Art. 78 42

N.Y. Civil Rights Law § 79-c 30, 42

7 N.Y. Code, Rules and Regulations § 261.3(b) 43

7 N.Y. Code, Rules and Regulations § 60.1(d) (repealed Oct. 19, 1970) 43

MISCELLANEOUS

"Developments in the Law—Federal Habeas Corpus", 83 Harv. L. Rev. 1038 (1970) 20, 26

Goldfarb and Singer, "Redressing Prisoners' Grievances", 39 Geo. Wash. L. Rev. 175 (1970) 17

Jacob, "Prison Discipline and Inmate Rights", 5 Harv. Civ. Rights L. Rev. 227 (1970) 21

Note, "Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts", 72 Yale L. J. 506 (1963) 17

Note, "Constitutional Rights of Prisoners. The Developing Law", 110 U. Pa. L. Rev. 985 (1962) ... 17

President's Commission on Law Enforcement and Administration of Justice, Task Force Report: "Corrections" (1967) 34

In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1369

RUSSELL G. OSWALD, Commissioner of Correctional Services; PAUL J. REGAN, Chairman of the Board of Parole; J. EDWIN LA VALLEE, Superintendent of Clinton Correctional Facility; JOHN T. DEEGAN, Superintendent of Auburn Correctional Facility; NEW YORK STATE BOARD OF PAROLE; and the NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,

Petitioners,

against

EUGENE RODRIGUEZ, MICHAEL KATZOFF and JOHN KRITSKY,

Respondents.

BRIEF FOR PETITIONERS

Opinions and Orders Below

The *in banc* decision of the Court of Appeals is reported at 456 F. 2d 79 and is reproduced in the Appendix commencing at page 113a. The order to *in banc* is set forth in the Appendix at page 112a.

The decision of the panel which initially decided the *Rodriguez* case is reported at 451 F. 2d 730. It is reproduced in the Appendix commencing at page 28a. The District Court opinion in *Rodriguez* is reported at 307 F. Supp. 627 and is included in the Appendix commencing at page 18a.

The opinion of the Second Circuit panel which initially decided the *Katzoff* case is reported at 441 F. 2d 558 and is included in the Appendix commencing at page 84a. The District Court opinion in *Katzoff* has not been officially reported. A copy is included in the Appendix commencing at page 62a.

No decision was rendered by the panel which heard the appeal in the *Kritsky* case. The opinion of the District Court is reported at 313 F. Supp. 1247 and is reproduced in the Appendix commencing at page 104a.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on January 25, 1972. The petition for certiorari was filed on April 24, 1972. Certiorari was granted on June 19, 1972.

Question Presented

Should State prisoners have the option of challenging the conditions of their confinement by means of the Civil Rights Act when there exists an appropriate remedy by way of habeas corpus?

Statutes

28 U.S.C. § 2241:

"Power to grant writ:

* * *

(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * *

(3) He is in custody in violation of the constitution or laws or treaties of the United States . . ."

28 U.S.C. § 2243:

"Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

28 U.S.C. § 2254:

"State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

* * *

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under

the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding."

42 U.S.C. § 1983:

"Civil Action For Deprivation of Rights

Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory subjects, or causes to be subjected, any citizen . . . or other person . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

New York Correction Law § 236:

"In all cases . . . where the [prison commutation] board shall withhold the allowance of the whole or any part of reduction of sentence for good conduct and for efficient and willing performance of duties assigned, they shall forward with their report to the commissioner of correction their reasons in writing, for such disallowance. The action of the board in granting or withholding reductions shall be deemed a judicial function and shall not be reviewable if done according to law."

Statement

Each of the respondents herein was confined in a correctional facility of the State of New York at the time he

commenced his *pro se* action in the federal courts. Each filed a combined civil rights complaint and petition for a writ of habeas corpus seeking his release from prison without previously seeking relief in the State Courts. Each asserted that he had been unconstitutionally deprived of his conditional release from prison by the action of the defendants in disallowing him a certain number of good conduct time credits, which action allegedly represented cruel and inhuman punishment. None of the respondents challenged the validity of his conviction or the sentence imposed.

A hearing was held in each case at which the respondents were represented by counsel. All three respondents received a favorable decision on the merits, resulting in the restoration of the disputed credits and immediate release from physical confinement. According to the records of the New York State Department of Correctional Services, the sentences of respondents Rodriguez and Katzoff have run. The maximum expiration date of respondent Kritsky is February 22, 1975.

Rodriguez

The underlying claim made by respondent Rodriguez in the District Court was that the determination disallowing the good conduct time in question was made without adequate notice and hearing and therefore violated his right to due process. At the District Court hearing he acknowledged that he had been charged with the possession of certain contraband letters and photographs which he admitted having received but asserted that he was not punished for this but because he refused to tell prison authorities how he had received the contraband correspondence.

In granting relief the District Court preliminarily held that the action brought by respondent was an action under the Civil Rights Act and that the habeas corpus aspect was "merely a proper adjunct to insure full relief" in

the event the respondent sustained his underlying claim. Therefore, respondent was not required to exhaust his state court remedies (20a).

The District Court accepted respondent's version of the summary procedures by which the determination was reached and found that the questioning by prison officials was solely in regard to how he got the uncensored materials into Sing Sing (25a). However, the Court made no specific finding that the assessment of time was a consequence of the refusal to inform. Although the Court expressed concern with the summary procedures employed, the decision specifically turned on the failure of the Prison Commutation Board to comply with the requirement of § 236 of the New York Correctional Law that it advise the Commissioner of Correction in writing of its reasons for upholding the disallowance of good behavior time. He deemed this omission "substantial" and held that it deprived respondent of both due process and equal protection of the law (27a).

On appeal the Second Circuit reversed the decision by a vote of 2 to 1. The majority rejected the District Court's "view that questions of constitutional significance are involved" (31a) concluding that (a) Correction Law § 236 is not constitutionally required and (b) respondent was not punished for the refusal to inform and, moreover, even if he had been, this would not have been unconstitutional (31a-32a). The Court held that, in any event, the decision was reversible because respondent Rodriguez had failed to exhaust his state court remedies as required by 28 U.S.C. § 2254(b) and (c).

Judge Waterman, dissenting, concluded that the record below demonstrated that the punishment was based on the refusal to inform, that this violated Rodriguez' constitutional rights and that while the violation of the Correction Law, standing alone, was not unconstitutional, it became so in the context of all that had occurred (37-38a).

Katzoff

Respondent Katzoff lost 50 days credit as a result of making derogatory comments about prison officials in his diary. He challenged the actions of prison officials as (1) having been taken without meeting the requirements of due process, (2) constituting cruel and inhuman punishment and (3) violating his rights under the First Amendment.

The District Court found that no rule or regulation barred the keeping of a diary; that the institution was aware that respondent Katzoff was keeping a diary and that there was no evidence that the contents of the diary were in any way made public to other inmates (65a).

The Court found as a matter of law that the petition was in the nature of a civil rights action and that the issuance of a writ of habeas corpus was only incidental as a means of enforcing the judgment (68a). While the procedure followed did not violate due process, punishment for acts not amounting to a violation of any institution rule did amount to such a violation. The Court further found that assuming such a regulation existed, the punishment of respondent for his unpublished comments by placing him in segregation with the accompanying loss of good time credit violated his rights under the First and Fourteenth Amendments (69a).

The Court directed the restoration of the time in issue and ordered respondent's immediate release.

A panel of the Second Circuit reversed the District Court by a vote of 2 to 1 without considering the merits on the ground that respondent Katzoff had failed to exhaust his remedies as required by 28 U.S.C. § 2254(b). The Court found that respondent was seeking release from custody and therefore, in essence, seeking habeas corpus relief.

> "There is no basis for limiting the concept of habeas corpus to attacks on custody because of defects in the original conviction as distinguished from a failure to

allow release according to law. '[R]elease from a penal custody is not an available remedy under the Civil Rights Act.' " (87a)

The Court rejected an argument that state remedies were inadequate because of the proximity of the release date as assuming

"without justification that state courts will be less responsive to a constitutional claim than the federal courts. There is no authority for the proposition that the proximity of release relieves a prisoner of the exhaustion requirements of Section 2254(b)." (88a)

Judge Smith dissented stating that this was not habeas corpus since the conviction and sentence were not being challenged. He cited the Circuit Court's opinion in *Sostre v. McGinnis*, 442 F. 2d 178 (2d Cir. 1971) (*in banc*), cert. denied sub nom. *Oswald* v. *Sostre*, 404 U.S. 1049 (1972) as allowing a civil rights action to seek restoration of good time, at least in a case of First Amendment rights and concluded that the fact that the restoration of credits resulted in release should not deprive an inmate of a federal forum under the Civil Rights Act. (88a)

Kritsky

The forfeiture of time in respondent Kritsky's case followed an institution-wide demonstration by the inmates of Auburn Correctional Facility in 1962. Respondent Kritsky claimed that he was charged with being a leader in the demonstration and that, in summary proceedings at which he pleaded not guilty, he was assessed 18 months good time credits. At the hearing in the District Court he acknowledged that he had participated in the demonstration and that if he had come out of his cell the first day and stayed out he would not have lost any time. However, the following day, instead of going to his job he voluntarily returned to his cell and stayed there in further protest.

After noting both the serious nature of the incident leading to the time disallowance and respondent Kritsky's acknowledgment that he was involved in it, the District Court held that the disciplinary hearing given him violated his right to due process (107-108a). The Court also determined that the Prison Commutation Board had not filed written reasons with the Commissioner for disallowing the time as required by § 236 of the New York Correction Law (110a). Accordingly, the Court directed that the time credits in issue be restored and ordered respondent's immediate release.

An appeal was argued before a panel of the Second Circuit but no decision had been reached as of the time that the three cases herein were ordered to be heard *in banc*.

The *In Banc* Opinions

Petitions for rehearing were denied by the respective panels which heard *Rodriguez* and *Katzoff*, on July 19, 1971 with Judge Waterman dissenting in *Rodriguez* and Judge Smith dissenting in *Katzoff*. At the request of the petitioners and of these judges a majority of the judges in active service voted for reconsideration in these cases *in banc* and, further, for initial consideration *in banc* of the *Kritsky* case, all three cases to be consolidated. On October 12, 1971 the matter was set down for argument and counsel were specifically advised "to be prepared to discuss the need for the petitioners to exhaust state remedies and the possibility of abstention."

On January 25, 1972, the Court issued an order affirming, 9 to 3, the judgments of the District Court in all three cases "upon consideration of the merits and upon the authority of *Wilwording* v. *Swenson*," 404 U.S. 249 (1971) (115a). Eight judges wrote separate opinions.

Chief Judge Friendly had previously voted for reversal but felt bound to affirm the orders of the lower court after this court's decision in *Wilwording*.

He expressed concern for the effect on federal-state relations caused by petitions of state prisoners complaining of the "time or conditions of their confinement" and pointed out that the concern for these relations "is not limited to attacks on the validity of the convictions". However, he concluded that if these petitions are held to be in the nature of civil rights actions, a federal court cannot require exhaustion of state remedies because of the decisions of this Court, including *Wilwording*, and because, in view of the *res judicata* effect, "abstention would mean abdication in any case where the state afforded a fair hearing" (116a).

Judge Friendly suggested instead that the

> "right answer . . . is that, under the broad scope the Supreme Court has given to the 'Great Writ' as enacted by the Act of 1867, 14 Stat. 385, all state prisoner petitions complaining of the length or manner of custody, however phrased, are in fact petitions for habeas corpus . . ."

to which the exhaustion requirement of § 2254(b) is applicable (116-117a). As such they would not be subject to *res judicata*.

Judge Friendly acknowledged that several cases, including *Houghton* v. *Shafer*, 392 U.S. 639 (1968) and *Jackson* v. *Bishop*, 404 F. 2d 571 (8th Cir. 1968), cited in *Wilwording*,

> "have assumed that state prisoner complaints over the conditions of custody come under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) rather than under 28 U.S.C. § 2254. But the issue was not there raised and the problem of such prisoner applications had not yet reached its present dimensions." (117a)

This analysis, if correct would seem to preclude an inmate from avoiding the exhaustion requirement simply by

denominating the petition as one under the Civil Rights Act. "But *Wilwording* seems to indicate that he can" and, therefore, Judge Friendly felt constrained to affirm (117a).

Judge Waterman concurred in the affirmance and referred to his dissenting opinion in *Rodriguez* v. *McGinnis*, 451 F. 2d 730 (2d Cir. 1971).

Judge Smith, concurring, concluded that neither the doctrine of abstention nor the habeas corpus exhaustion requirement could bar a state prisoner from choosing a federal forum under the Civil Rights Act. In addition, he questioned whether the federal courts should attempt to avoid or delay hearing state prisoners' complaints of unconstitutional abuse since although many petitions "are poorly prepared, confusing and mendacious" and "do take the time of busy courts", the instant cases demonstrate that there are cases of substance which make the "effort worthwhile" (118a).

Judge Kaufman viewed the question for decision solely in terms of whether exhaustion of judicial remedies was required before a state prisoner could seek relief under the Civil Rights Act and concluded that it was not, especially after *Wilwording* (119a). He did not deal with the question of whether the claims before the Court were properly brought under the Civil Rights Act to begin with but assumed that they were. Indeed, except for Judges Friendly and Mansfield, none of the judges who wrote opinions undertook to discuss, let alone resolve this question.

In Judge Kaufman's view

> "federal jurisdiction in cases involving prisoner rights is [no] more offensive to the state than federal jurisdiction in the areas of police procedures for search, arrest and detention . . . or education . . . or welfare . . . or public housing . . ." (120a)

In any event, neither this reason nor the increasing burden on the federal courts is a "tolerable basis for declining

jurisdiction where a prisoner specifically alleges facts indicating a callous disregard of his basic human and unconstitutional rights, see *Haines* v. *Kerner*, 406 U.S.L.W. 4156 (U.S., Jan. 13, 1972)" (120a).

Judge Kaufman reasoned that allowing inmates the option of proceeding under the Civil Rights Act would not subvert the exhaustion requirement of the habeas corpus statute since 28 U.S.C. § 2254(b) is intended to apply only where the original conviction and sentence are being challenged (121a). In so doing he ignored the fact that in *Wilwording* this Court assumed the applicability of the exhaustion requirement to such claims if brought by way of habeas corpus. On the other hand, Judge Kaufman relied upon the fact that in *Wilwording* this Court *sua sponte* construed the petition as in the nature of a civil rights action and he concluded from this that inmates have an option to use either procedure.

> "I find it difficult to believe that the Court, confronted with the alternative modes of pleading, overlooked or did not consider fully the interaction of 28 U.S.C. § 2254(b) and 42 U.S.C. § 1983." (121a)

Judge Feinberg also rejected the applicability of the exhaustion and abstention doctrines suggesting that in view of the overwhelming numbers of "frivolous prisoner petitions" some fair way of dealing with the problem is called for but it must come by way of a statute from Congress

> "which could take into account the conflicting policy considerations and could include compromises, limitations and safeguards that one as a court cannot legislate." (122a)

Judge Mansfield stated that prior to *Wilwording* he believed that

> "a federal court, upon its finding that the prisoner was seeking equitable relief [in a § 1983 complaint which could not be treated as a petition for habeas

> corpus] and was afforded an adequate state court remedy (as here), had the discretionary power as a court of equity to defer action pending the prisoner's application to the state court for relief. . . . Upon the prisoner's showing that the state would not afford a reasonably prompt and fair hearing, on the other hand, the federal court would be required to proceed." (122-123a)

In support of this view Judge Mansfield emphasized both the competence and convenience of the state courts in regard to this particular type of claim. He also cited statistics which attest to the

> "extent to which state prisoners' *habeas corpus* petitions have been dressed up in a § 1983 suit of clothes, often merely with a view to the prisoner's availing himself of the change of scenery offered by federal facilities. . . ." (123a)

Judge Oakes disputed the suggestion that the federal courts are being flooded by frivolous claims of state prisoners but if such a burden has been created the solution must come from the Legislature. He further expressed his "vehement disagreement" with the opinions of Judge Friendly and Mansfield to the extent that they "imply a request to the Supreme Court to reconsider and overrule its own line of cases sustaining jurisdiction . . ." (124a).

Judge Lumbard dissented together with Judges Hayes and Moore stating that he favored reversing and remanding to the District Court "with directions to stay further proceedings pending a hearing of the claims in the state court" (125a).

Judge Lumbard acknowledged that *Wilwording* suggests that state prisoners need not exhaust their state judicial remedies prior to invoking § 1983 but pointed out that in that case it was clear that Missouri Courts did not review such claims. By contrast, New York "does provide an

adequate remedy in its courts for the redress of legitimate prisoner complaints" (126a) [citing Section 79-c of the New York Civil Rights Law] and, therefore, except in cases of on-going physical brutality, he would require prior resort to this remedy.

Although this Court's decisions in *Monroe* v. *Pape*, 365 U.S. 167 (1961), *McNeese* v. *Board of Education*, 373 U.S. 668 (1963), *Damico* v. *California*, 389 U.S. 416 (1967) and *Houghton* v. *Schafer*, 392 U.S. 639 (1968) have been relied upon to reach the contrary conclusion, Judge Lumbard emphasized the fact that only *Houghton* involved a state prisoner's claim and there was no evidence there regarding the nature of state remedies available.

> "In any event, the Court did not pass on the considerations which seem to me to compel the conclusion that the federal courts should not hear these cases in the first instance where the state courts are ready, willing and able to give relief." (126a)

These considerations include the state's interest in resolving disputes between "inmates and jailers", the greater convenience of hearing these claims in nearby state courts and the potential for increasing tension in the institution as a result of permitting review in the federal courts (127a). Judge Lumbard cited by way of example the dislocation caused by the lengthy hearing in *Sostre* v. *McGinnis*, 442 F. 2d 178 (2d Cir. 1971) (*in banc*). If the state court hearing is not full and fair, the inmate would still have available a *de novo* review in the federal court.

Judge Lumbard included statistics showing that the number of civil rights actions filed in the Second Circuit by state prisoners has increased from 21 in 1966 to 585 in 1971 and disputed that § 1983 was intended to "be the means whereby state prisoners would place state authorities on trial for the manner in which they were cared for and disciplined in state prisons" (128a). Although more

habeas corpus petitions are filed Judge Lumbard pointed out that many of these can be disposed of on the papers whereas many § 1983 actions require hearings and the testimony of witnesses. Furthermore, in habeas corpus

> "a record has already been made in the state court, whereas civil rights cases always raise issues which have recently arisen and are wholly undetermined." (129a)

Judge Lumbard warned that unless the district courts defer these matters to the state courts as a matter of discretion, "the federal courts will find themselves in the business of running and regulating state prisons" (129a).

Summary of Argument

Respondents were duly convicted by state courts and were confined at the commencement of these actions by state authorities. Despite the ready availability of state remedies they proceeded directly to federal court claiming under the Civil Rights Act (42 U.S.C. § 1983) that they were entitled to their release from custody because the Commissioner of Correctional Services and his subordinates unconstitutionally extended their time in prison by depriving them of good conduct time credits.

However, a civil rights action was not the proper procedure for reviewing these or any other claims of state prisoners relating to their confinement. That is the specific function of the writ of habeas corpus (28 U.S.C. § 2243)—a remedy which respondents could not utilize because they had not first presented their contentions to the state courts. 28 U.S.C. § 2254; *Picard* v. *Connor*, 404 U.S. 270 (1971).

These cases thus demonstrate that although it is necessary and proper that the state courts have an opportunity to review state prisoner claims of misconduct by correction authorities, state inmates presently have the power of thwarting that interest and affecting the interest of the

federal courts as well. Moreover, since this Court's decision in *Wilwording* v. *Swenson*, 404 U.S. 249 (1971), the interests of the state courts may also be affected by the apparent power of the federal courts to treat as civil rights actions applications initiated by way of a habeas corpus petition.

Petitioners believe that state prisoners should not have the option of determining whether a federal or state court initially hears their complaints, but must proceed by way of habeas corpus. *A fortiori*, the classification of prisoner complaints should not vary according to which federal court hears a particular case.

The rationale for the concurrent federal remedies in prison condition cases has never been articulated. However, the parallel development undoubtedly reflects the fact that prior to this Court's decisions in *Jones* v. *Cunningham*, 371 U.S. 263 (1963) and *Carafas* v. *LaVallee*, 391 U.S. 234 (1968) the limits of the concept of custody for purposes of habeas corpus were uncertain. Elimination of this uncertainty now precludes the granting of equitable relief under the Civil Rights Act because an adequate legal remedy by way of federal habeas corpus is available.

So long as both state and federal courts were reluctant to review the actions of state correction authorities it mattered little in practical terms which of the two remedies was utilized by the state prisoner. In recent years, however, this reluctance, often described as the "hands-off doctrine", has been criticized and observed more often in the breach.* Understandably, there has been a flood of actions by state prisoners relating to all aspects of their

---

* See generally Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 Yale L.J. 506 (1963); Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. Pa. L. Rev. 985 (1962); Goldfarb and [illegible], *Redressing Prisoners' Grievances*, 39 Geo. Wash. L. Rev. 175 (1970).

confinement. Typically they are brought under the Civil Rights Act in order to avoid the exhaustion requirement. However, as in *Wilwording*, the inmate who has previously brought a civil rights action may seek to avoid the strictures of *res judicata* by petitioning for habeas corpus. The result is not merely an increased burden on the federal courts but also an increased strain on the relationship between federal and state courts.

In the face of both the unmistakable trend toward state prisoner reliance on the Civil Rights Act and the disparity in treatment which must result from the reliance below on the *Wilwording* decision, all prisoner claims relating to their confinement should be required to be brought by way of habeas corpus which is a flexible remedy, particularly suited to the review of prisoner claims of any type. This conclusion not only takes into account the nature of the remedy and the interests of the inmate, but also is responsive to the interests of the federal courts which have been deluged with this type of application, the state courts which have a distinct role to play in developing and applying federal standards, and the state correction authorities who have taken significant steps to protect the inmate's developing rights.

POINT I

The habeas corpus statute is specifically applicable to state prisoners and tailored to their litigation needs. That statute—and not the inmate or local federal court—should determine how their claims relating to confinement are reviewed, particularly since the habeas corpus remedy respects the valid concerns of the state in reviewing all prisoner claims.

The essence of an application for a writ of habeas corpus is an attack by a person in custody on the legality of that custody. 28 U.S.C. § 2254(a). As a result of this Court's expansion of the concept of custody, and con-

...antly of the relief available by way of habeas corpus, ... remedy properly comprehends *all* inmate attacks on ... custody, whether the challenge is to the manner of ...ody, the place of confinement or the actual length of ...tody. Therefore, such claims should not be considered ...der the Civil Rights Act but only by way of habeas ...rpus.

It is now clear that the two longstanding conceptual re...trictions on the applicability of the habeas corpus remedy ...prisoner claims no longer exist. The first is that habeas ...rpus lies only to effect immediate release of the inmate. ...e other is that habeas corpus is limited to reviewing the ...lidity of the conviction and sentence.

...arafas v. *LaVallee*, 391 U.S. 234, 239 (1968) established ...at

> "the [habeas corpus] statute does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted. It provides that '[t]he court shall . . . dispose of the matter as law and justice require.' 28 U.S.C. § 2243 . . ."

...e also *Dowd* v. *United States ex rel. Cook*, 340 U.S. 206, ...10 (1951).

...s this Court observed in *Jones* v. *Cunningham*, 371 ...S. 236, 243 (1963):

> "[The writ of habeas corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."

...hus, recent cases have applied the habeas corpus ...edy to questions of solitary confinement (*Jones* v.

Decker, 436 F. 2d 955 [5th Cir. 1970]), future release (*Peyton* v. *Rowe*, 391 U.S. 54 [1968]; *United States ex rel. Meadows* v. *New York*, 426 F. 2d 1176 [2d Cir. 1970]; *Nelson* v. *George*, 399 U.S. 224 [1970]) and conditions of confinement imposed by prison authorities. *Johnson* v. *Avery*, 393 U.S. 483 (1969). See *"Developments in the Law—Federal Habeas Corpus"*, 83 Harv. L. Rev. 1038, 1079-1087 (1970).

The remedy has also been applied in cases involving changes in the place and nature of the confinement. *United States ex rel. Schuster* v. *Herold*, 410 F. 2d 1071 (2d Cir. 1969), cert. denied 396 U.S. 847; *Strowder* v. *Shovlin*, 380 F. 2d 370 (3d Cir. 1967). But see *Gomez* v. *Miller*, 341 F. Supp. 323 (S.D.N.Y. 1972) (three judge court declared unconstitutional state procedure for committing defendants not yet tried to Matteawan State Hospital) (jurisdictional statement filed sub nom. *Miller* v. *Gomez*, August 21, 1972, 41 U.S.L.W. 3102).*

A fortiori, habeas corpus is the appropriate means of questioning the legality of the *duration* of custody in good conduct time cases such as the instant ones, all of which relate in essence to the right to future release. But see *Landman* v. *Royster*, 333 F. Supp. 621, 650-51 (E.D. Va. 1971). Thus, although respondents' applications made allegations regarding *inter alia* the fairness of disciplinary procedures, the constitutional import of failing to maintain certain records as required by state statute and the seriousness of the punishment imposed in relation to the offense charged, the demand in each was for the restoration of good time which had been either withheld or forfeited. Resolution of these claims, therefore, is necessarily directly related to custody since it affects the most concrete example of custody, the duration of physical

---

* In *Gomez*, according to the majority, the case could not be classified as habeas corpus because granting the relief sought by the plaintiffs would not result in their release from custody.

confinement within the institution. Indeed, one writer has stated:

> "From the inmate's standpoint the most severe punishment is that of good time forfeiture, because it affects the length of the term which he must serve."

Jacob, *Prison Discipline and Inmate Rights*, 5 Harv. Civil Rights L. Rev. 227, 234 (1970).

Similarly, claims affecting parole eligibility and parole revocation are natural cases for consideration by way of habeas corpus. *Morrisey* v. *Brewer*, —— U.S. ——, 92 S.Ct. 2593 (1972); *Daugherty* v. *Craven*, 422 F. 2d 7 (9th Cir.) cert. denied 397 U.S. 964 (1970); *Morris* v. *Wingo*, 431 F. 2d 651 (6th Cir. 1970); *Murphy* v. *Turner*, 526 F. 2d 462 (10th Cir. 1970); *Smartt* v. *Avery*, 411 F. 2d 408 (6th Cir. 1969).

The habeas corpus nature of all of these cases is not altered by the underlying constitutional issues raised any more than an ordinary habeas corpus application challenging the inmate's conviction is altered by variations in the underlying constitutional claim involved. In both situations the essence of the proceeding is the legality of custody.

This fact was recognized nearly thirty years ago by the Sixth Circuit in its far-sighted opinion in *Coffin* v. *Reichard*, 143 F. 2d 443, 445 (6th Cir. 1944):

> "Any unlawful restraint of personal liberty may be inquired into on habeas corpus. In re Bonner, 151 U.S. 242, 14 S. Ct. 323, 38 L. Ed. 149. This rule applies although a person is in lawful custody. His conviction and incarceration deprive him only of such liberties as the law has ordained he shall suffer for his transgressions. * * *
>
> A prisoner is entitled to the writ of habeas corpus when, though lawfully in custody, he is deprived of some right to which he is lawfully entitled even in his

> confinement, the deprivation of which serves to make his imprisonment more burdensome than the law allows or curtails his liberty to a greater extent than the law permits. Logan v. United States, 144 U.S. 263, 12 S. Ct. 617, 37 L. Ed. 429."

Nevertheless, the Court below concluded that the instant cases may be considered under the Civil Rights Act even though a favorable decision on the merits resulted in respondents' release from physical confinement—the traditional and typical relief sought by way of habeas corpus.*

It is evident from the individual opinions of the Court of Appeals that this result was reached without, for the most part, any attempt to consider the proper nature of the cause of action under review. Only Judges Friendly and Mansfield determined that these cases should be treated as habeas corpus and not civil rights actions but, despite this belief, felt constrained to join the majority following their reading of this Court's decision in *Wilwording* v. *Swenson*, 404 U.S. 249 (1971).

The potential impact of *Wilwording*, as illustrated by its application in this case, justifies, if not compels, a reexamination of the conclusion reached there. In *Wilwording* the petitioners filed habeas corpus applications in the District Court raising Eighth Amendment claims relating to "living conditions and disciplinary measures . . . in maximum security confinement," 404 U.S. at 249. Counsel who represented the petitioners understandably never contended that the actions were other than habeas corpus, since the same or similar claims previously had been resolved against these same petitioners in civil rights actions.**

---

* A subsequent disavowal by the successful applicant that this was his purpose in bringing the action is both unrealistic and legally irrelevant. *Grayson* v. *Montgomery*, 421 F. 2d 1306, 1308 (1st Cir. 1970). Section 2254(a) says nothing about motive.

** The doctrine of *res judicata* is inapplicable in habeas corpus. *Fay* v. *Noia*, 372 U.S. 391, 423 (1963).

The sole issue decided by the Eighth Circuit and presented to this Court was the question of exhaustion of state remedies for purposes of 28 U.S.C. § 2254(b).

After finding that the claims raised were "cognizable in federal habeas corpus" (404 U.S. at 249, 251) this Court held that the exhaustion requirement did not require repetition of state applications since Missouri had no available remedy for the review of these claims. Then, without being tendered the alternative by the petitioners or their attorneys, this Court, *sua sponte* held that in any event, the petitioners were *"entitled* to have their action treated as claims for relief under the Civil Rights Act, not subject, on the basis of their allegations, to exhaustion requirements." 404 U.S. at 251 (emphasis supplied).

The brief opinion in *Wilwording* does not indicate why this Court denominated the actions as civil rights actions despite the studious attempt by counsel to avoid this designation. Was it the particular claims raised in that case? Was it the type of claim raised? Or does *Wilwording* permit judicial redesignation of the pleadings in *any* prisoner initiated action except those relating to conviction and sentence?*

Whichever consideration motivated the majority of this Court in *Wilwording*, the Court below clearly read the opinion as reinforcing, at the least, the *inmate's* option of deciding under which statute to bring his claims. Even given this construction, *Wilwording* threatens to become a springboard for unpredictability in the area of prisoner

---

* The redesignation which took place in *Wilwording* is to be distinguished from the case where a court merely construes a poorly drafted *pro se* application broadly so as to protect the rights of the inmate. *Johnson* v. *Avery*, 252 F. Supp. 783 (M.D. Tenn. 1966). In *Wilwording*, the petitioners—who were represented by counsel—not only proceeded by means of an appropriate remedy but, according to the holding of this Court, their claims were susceptible to immediate review because the exhaustion requirement had been satisfied.

claims at the very time when, because of the decline of the hands-off doctrine, the number of such claims is mushrooming and firm guidelines have become a necessity.

For example, in some circuits, parole questions, which inevitably affect custody, may correctly be regarded as habeas corpus and subject to the exhaustion requirement. *Smartt* v. *Avery*, 411 F. 2d 408 (6th Cir. 1969). In other circuits, however, the federal courts simply may proceed to consider the merits of such claims on the ground that they are cognizable under the Civil Rights Act. *United States ex rel. Campbell* v. *Pate*, 401 F. 2d 55 (7th Cir. 1969). Yet there is absolutely no substantive reason for the difference in treatment. Compare also *Sostre* v. *McGinnis*, 442 F. 2d 178 (2d Cir. 197) (in banc), cert. denied sub nom. *Oswald* v. *Sostre*, 404 U.S. 1049 (1972) (release from segregation reviewed under the Civil Rights Act) with *Jones* v. *Decker*, 436 F. 2d 955 (5th Cir. 1970) (release from segregation is cognizable via habeas corpus and exhaustion is required) and *Johnson* v. *Avery*, 252 F. Supp. 783, 787 (M.D. Tenn. 1966), *rev'd* 383 F. 2d 353 (6th Cir. 1967), *rev'd* 393 U.S. 483 (1969) (solitary confinement "is, in a sense, a jail within a jail").

Conflict within a circuit is similarly a possibility if the nature of the cause of action may reflect the vagaries of court and plantiff. *Gomez* v. *Miller*, 341 F. Supp. 323 (S.D.N.Y. 1972) is an example insofar as the three-judge court, citing *Wilwording*, specifically rejected defendant's contention that the action was in the nature of habeas corpus despite an earlier decision by the Second Circuit in an analogous situation. *United States ex rel. Schuster* v. *Herold*, 410 F. 2d 1071 (2d Cir. 1969), cert. denied 396 U.S. 847 (habeas corpus).

Aside from differences in treatment, if federal courts may freely redesignate the nature of the action and state prisoners have the option of presenting their grievances under the Civil Rights Act, this Court's expansion of the

will necessarily be affected. The practical consequence must be that habeas corpus relief will be confined largely to cases involving the validity of the original conviction and sentence.

A. If state prisoners may ignore the habeas corpus remedy and bring their claims regarding confinement directly to the federal courts under the Civil Rights Act, they have the power of unilaterally overriding the State's interest in first reviewing such claims.

Utilization of the habeas corpus remedy serves the principle of comity by means of the exhaustion requirement. That principle—defined by the late Mr. Justice Black as "a proper respect for state functions" (*Younger* v. *Harris*, 401 U.S. 37, 44 [1971])—has as much relevance in the area of state prison administration as in cases where the original conviction and sentence are being challenged. Indeed, Chief Judge Friendly suggests that it may have more relevance.

Thus, traditionally the federal courts have expressed reluctance to intervene in this area except in the most egregious cases. *Wright* v. *McMann*, 387 F. 2d 519 (2d Cir. 1967); *Pierce* v. *LaVallee*, 293 F. 2d 233 (2d Cir. 1961); *Johnson* v. *Avery*, 393 U.S. 483 (1969); *Douglas* v. *Sigler*, 386 F. 2d 684, 688 (8th Cir. 1967); *United States* v. *Marlowe*, 341 F. 2d 782, 789 (9th Cir. 1965). However, in recent years this reluctance has diminished and federal courts have reviewed virtually every aspect of prison administration ranging from broad-based examination of institution-wide conditions (See, *e.g.*, *Landman* v. *Royster*, 333 F. Supp. 621 [E.D. Va. 1971]; *Holt* v. *Sarver*, 309 F. Supp. 362 [E.D. Ark. 1970]) to such individual claims as denial of medical treatment (*Martinez* v. *Mancusi*, 443 F. 2d 921 [2d Cir. 1970]) and cases like the instant ones challenging the validity of disciplinary decisions. See also *Carothers* v. *Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970). It therefore becomes even more important to require that

state prisoner complaints be presented by way of habeas corpus—a remedy which can mitigate the irritation to federal-state relations that is the natural consequence of this increased intervention, especially as greater numbers of state inmates seek direct review in the federal courts.

In this area, no less than in the area of conviction and sentence, the exhaustion requirement of the habeas remedy "preserves the role of the state courts in the application and enforcement of federal law." In this area, no less than in the area of conviction and sentence, permitting inmates to by-pass the state courts

> "would tend to remove federal questions from the state courts, isolate those courts from constitutional issues, and thereby remove their understanding of and hospitality to federally protected interests." *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1094 (1970).

Respondent Katzoff argued in the Circuit Court, however, that even if prisoner complaints must be brought by way of habeas corpus, the exhaustion requirement would not be applicable because historically it was intended to apply only to attacks on the validity of the conviction and sentence. In support of his position he cited *Ex Parte Royall*, 117 U.S. 241 (1886), the decision in which the exhaustion doctrine has its origin, and a Wisconsin District Court decision, *Edwards* v. *Schmidt*, 321 F. Supp. 68 (D.C. Wis. 1971). Apparently there was no unanimity among the Second Circuit on this point despite this Court's unequivocal application of the exhaustion doctrine to the Eighth Amendment claims in *Wilwording* v. *Swenson*. For example, Judge Friendly assumed the requirement would be applicable. Judge Kaufman, on the other hand, viewed the requirement restrictively.

Respondent's argument is invalid for at least two reasons. First, contrary to respondent's reading of *Ex Parte*

Lovell, the language of the decision is clearly broad enough to encompass a more generalized concern with federal-state relations than simply non-interference with state court criminal judgments. Thus, the opinion states that the discretion vested in the District Courts

> "should be exercised in the light of the relations existing under our system of government between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." 117 U.S. at 251.

The same broad concern for "Our Federalism" was echoed by Mr. Black in a somewhat different but related context:

> "The concept [of federalism] does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."

Younger v. *Harris*, 401 U.S. 37, 44 (1971).

More important, the habeas corpus remedy as we know it today is radically different from what it was even twenty years ago and, therefore, the impact on federal-state relations is also different. It is only appropriate that the applicability of the exhaustion requirement be responsive

to the dynamics of the remedy as well as to the expansion of the substantive rights now recognized. *Edwards* v. *Schmidt*, *supra*, is, therefore, of dubious value as authority just because of its failure to examine the reasons for applying the exhaustion requirement outside the sphere of claims relating to conviction and sentence.*

The concern for the role of the state courts in reviewing prisoner complaints has particular relevance because the claims asserted arise as a direct consequence of the process of state conviction and sentence. This relationship is perhaps most evident with respect to problems of parole and good conduct time to the extent that these problems inhere in the sentence imposed. However, the manner in which the sentence is administered is equally a consequence of conviction and sentence and the courts which impose these restraints have the primary obligation and should bear the primary burden of insuring that the restraints are not unconstitutional or otherwise in excess of the punishment contemplated by the sentence.

Some states have long assumed this burden and provide a broad remedy for all types of prisoner complaints. California is an outstanding example. See, *e.g.*, *In re Harrell*, 470 P. 2d 640 (1970) (attack on regulation restricting mutual prisoner legal assistance); *In re Riddle*, 372 P. 2d 304 (1962) (alleged infliction of cruel and unusual punishment); *In re Ferguson*, 361 P. 2d 417 (1961) (retriction on religious rights of inmates).

Other states have only recently responded to the dramatic expansion of prisoner rights now taking place. In

---

* *Edwards* also reads the legislative history of 28 U.S.C. § 225 enacted in 1948 (Act of June 25, 1948, Ch. 646, 62 Stat. 967) a limiting the exhaustion requirement solely to post-conviction a tacks on conviction and sentence. Yet this Court has held th § 2254 is an expression of prior case law (*Fay* v. *Noia*, 372 U.S. 3 435 [1963]), which would include *Ex Parte Royall* where the d trine was applied in *advance* of a state court trial.

ex rel. Thomas v. *State*, 198 N.W. 2d 675 (Sup. Ct. 1972), the Supreme Court of Wisconsin held that mandamus lies to test whether state correction authorities properly exercised their discretion with respect to medical treatment afforded petitioner. The Court also comprehensively reviewed the recent decisions involving censureship of mail and held that the petitioner was entitled to an injunction restraining prison officials from interfering with his mail to a government agency "unless the Department can show justification for its action." 198 N.W. 2d at 683.

In *Jackson* v. *Hendrick*, —— D. and C. 2d —— (Ct. of Com. Pleas, Phila. Co., April 7, 1972), 40 U.S.L.W. 2710 (May 2, 1972), the Court of Common Pleas in Pennsylvania held that conditions in the three city prisons of Philadelphia violated both the federal and state constitutions.

In *Sellers* v. *State of South Carolina*, Court of General Sessions, South Carolina (February 1, 1972), a petition was brought by five inmates challenging the revocation of their good conduct time credits and their confinement in segregation. Following a hearing, the South Carolina Court of General Sessions ordered restoration of the credits on the ground that they were forfeited without "minimal procedural protection for the petitioner." Confinement of the petitioners in administrative segregation was found to be proper.* Significantly, although both sides have appealed, two of the petitioners nevertheless made interim applications to the Federal District Court for relief. In *Lambert* v. *Department of Corrections*, —— F. Supp. ——, Civil No. 71-1185 (D.C.S.C., April 12, 1972), the petition was dismissed for failure to exhaust state remedies. In *Sellers* v. *Department of Corrections*, ——

*Since decisions of the Court of General Sessions are not officially reported, a copy of the order in the *Sellers* case is set forth as an Exhibit to this brief and designated as Exhibit "A".

F. Supp. ——, Civil No. 71-1161 (D.C.S.C., March 28, 1972), the District Court viewed some of the claims as cognizable under the Civil Rights Act and retained jurisdiction but deferred ruling on the merits pending exhaustion of state court remedies. The case is illustrative not only of the state court's willingness to comprehensively review the claims raised in light of changing standards but also of the unrestrained resort by inmates to the federal courts and the disparity of treatment depending on which federal judge reviews the applications.

New York provides a perfect example of what can happen if state prisoners are free to by-pass the state courts. In 1969 the New York Legislature, in direct response to the Second Circuit's decision in *Wright* v. *McMann*, 387 F. 2d 519 (2d Cir. 1967), enacted Section 79-c of the New York Civil Rights Act which provides an explicit remedy by way of injunction to inmates "for improper treatment where such treatment constitutes a violation of [their] constitutional rights." In *Marcelin* v. *Scott*, 33 A.D. 2d 588 (3d Dept. 1969), Section 79-c was given the following broad interpretation:

> "Said amendment, remedial in nature, designed to correct an imperfection in the prior law or to provide a remedy for a wrong if none previously existed, is to be liberally construed so as to spread its beneficial results as widely as possible . . ."

Nevertheless there is not one reported decision in New York on the merits of any claim brought under this unique provision. Nor has investigation of files in this office disclosed any unreported decisions. The fact is that Section 79-c simply is not used by New York inmates who instead have applied to the federal courts for injunctive relief. It is all too apparent that so long as state inmates have it within their power to ignore such remedies there is little incentive for the Legislature to make further changes or for the state courts to liberally construe them.

A related consideration in evaluating the federal-state relationship is the fact that many states, including New York, have promulgated new and far reaching regulations relating to discipline procedures as well as other areas of prison administration. See *e.g.*, *Cupp* v. *Swenson*, 288 F. Supp. 1 (W.D. Mo. 1968); *Morris* v. *Travisono*, 310 F. Supp. 857 (D.R.I. 1970). They should have the initial opportunity to see that the new procedures are being properly and consistently implemented.

As the District Court observed in *Cupp* v. *Swenson*, *supra*, in light of new grievance procedures available to Missouri inmates:

> "The interests of comity also require that this Court allow . . . the higher officials of the Department of Corrections to be aware of and make decisions about administrative practices and procedures before litigation in this Court involving federally protected rights of inmates is processed to final judgment.
>
> • • •
>
> [W]hen appropriate provisions for administrative review have been established by penitentiary administration for claims of deprivation of rights, abstention by a court until final administrative determination has been made is justified." 28 F. Supp. at 3.

Cf. *Sostre* v. *McGinnis*, 442 F. 2d 178 (2d Cir. 1971) (in banc), cert. denied sub nom. *Oswald* v. *Sostre*, 404 U.S. 1049 (1972) (letter to Commissioner of Correction deemed inadequate administrative review).

The Court in *Cupp* also noted that requiring administrative review would often result in more rapid relief than would protracted litigation and, in any event, both the inmates and the administration would have "the benefit of a written and documented decision in the event future court action should prove to be necessary."

Significantly, neither respondents nor the Court below have ever taken into account the fact that the relief typi-

cally sought by federal prisoners who challenge a forfeiture of good conduct time (18 U.S.C. §4161) is habeas corpus (*McKinney* v. *Taylor*, 344 F. 2d 854 [10th Cir. 1965]; *Powell* v. *Hunter*, 172 F. 2d 331 [10th Cir. 1949]; *Sullivan* v. *Ciccone*, 311 F. Supp. 456 [W.D. Mo. 1970]; *Lloyd* v. *Heritage*, 199 F. Supp. 46 [N.D. Ga. 1961]) and that a prerequisite to habeas corpus review in these cases is the exhaustion of available administrative remedies. *Smoake* v. *Willingham*, 359 F. 2d 386 (10th Cir. 1966); *United States ex rel. Weyrauch* v. *Parker*, 268 F. Supp. 785 (M.D. Pa. 1967). See also *Light* v. *United States*, 430 F. 2d 932 (5th Cir. 1970) (federal prisoner claiming interference with right to consult with counsel required to exhaust administrative remedies); *Paden* v. *United States*, 430 F. 2d 882 (5th Cir. 1970) (federal prisoner seeking order directing prison authorities to permit formation of black culture organization and allow use of prison facilities for activities required to exhaust administrative remedies).

The appropriateness of requiring prior resort to the state courts is underscored by the very nature of prison administration. Because potential litigation arises on a day-to-day basis it is most efficiently handled where the alleged violation occurred.

Judge Mansfield correctly drew attention to the fact that the State Courts are not only indisputably competent to apply federal constitutional principles but also are physically and practically in a better position to do so. With the exception of the Wallkill Correctional Facility, State Supreme Court judges sit on a regular basis at each of the State's correctional facilities to "hear applications for writs of habeas corpus *or other proceedings* regarding detention or confinement." *Wright* v. *McMann*, 321 F. Supp. 127 (N.D.N.Y. 1970). In *Wright* this practice was characterized as "the acme of judicial service."*

* This language was not affected by the decision of the Second Circuit which affirmed in part, and reversed in part the orders of the District Court. 460 F. 2d 126 (2d Cir. 1972).

Thus, inmates may present their grievances to a court at the place of their confinement where the relevant records are available and where potential witnesses usually are located. Under this system inmates are in a position to press their claims without the delay occasioned by the geographical obstacles which arise when they seek relief in the federal courts. Moreover, requiring prisoners to bring their complaints closer to home minimizes the temptation of initiating litigation solely for the purpose of travel.

Judge Kaufman suggests that the State is no more sensitive to federal jurisdiction in 'cases involving prisoners' complaints than it is to federal jurisdiction in the areas of education, welfare, public housing and police procedures for search and arrest.* We respectfully disagree. The area of prison administration is unique.

The relationship of state prisoners and the officers of the State who supervise their confinement is far more intimate than that of the State and a private citizen. For state prisoners eating, sleeping, dressing, washing, working and playing all are done under the color of state "statute, ordinance, regulation, custom or usage" (42 U.S.C. § 1983). This is because

> "[e]normous discretion is left to correctional administrators to define the conditions of imprisonment. They determine the way in which the offender will live for the term of imprisonment; how he is fed and clothed; whether he sleeps in a cell or a dormitory; whether he spends his days locked up or in relative freedom; what opportunity he has for work, education or recreation. They regulate his access to the outside world by defining mailing and visiting privileges. They

---

*This suggestion represents an apparent departure from Judge Kaufman's views as stated in 1967 in the case of *Wright* v. *McMann*, 387 F. 2d 519 (2d Cir. 1967) where he characterized the area of prison administration as "an area so peculiarly within the concern of the states." 387 F. 2d at 525.

define rules of conduct and the penalties for violation of such rules. And, increasingly, they make classification decisions—assigning different prisoners to different kinds of correctional programs."

President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections, 84.

Thus, the possibility for federal litigation is limitless. What for a private citizen would be an altercation with his landlord, a difference with his employer, a dispute with a clothier, an argument with a neighbor, a family feud becomes, for the prisoner, a federal case. *Landman* v. *Royster*, 333 F. Supp. 621, 644 (E.D. Va. 1971).

The petitioner in *King* v. *McGinnis*, 289 F. Supp. 466 (S.D.N.Y. 1968) challenged the unsealing of his Christmas cards under the First Amendment. In New Jersey, a petitioner sought a room with a view in a federal action. *United States ex rel. Stuart* v. *Yeager*, 293 F. Supp. 1079 (D.C.N.J. 1968). Even Courts of Appeals have become embroiled with the petty disputes of prisoners. In *Brooks* v. *Wainwright*, 428 F. 2d 652 (5th Cir. 1970), the Court reviewed petitioner's tonsorial complaints. In *Howard* v. *Swenson*, 426 F. 2d 277 (8th Cir. 1970), another Court solemnly considered the confiscation of shoes. And in *Hanvey* v. *Pinto*, 441 F. 2d 1154 (3d Cir. 1971), the mere transfer of an inmate to a different wing of the same prison was claimed to be unconstitutional simply because the consequent change in prison jobs afforded him less of an opportunity to earn good time credits.

The geometric increase in the number of colorable claims which must be formally processed as civil actions bears witness to the validity of the State's concern in this area. In 1970 the number of non-habeas corpus petitions filed by state prisoners in the federal courts increased by 41 per cent over 1969, and by 430 per cent over 1963. *Wilwording* v. *Swenson*, 439 F. 2d 1331, 1333 n. 3 (8th Cir. 1971). Statis-

tics cited by Judge Lumbard showed that the number of civil rights actions initiated by state prisoners in the Second Circuit increased from 21 in 1966 to 585 in 1971.

These numbers also bear witness to the increasing burden on federal courts already plagued by backlogs on the civil calendar. See dissenting opinion of the late Mr. Justice Black in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 423-9 (1971). Judges Feinberg and Oakes argue that this problem is one for the Legislature. We believe, however, that the solution lies not with the Legislature but in the already existing, applicable habeas corpus statute.

B. The state prisoner who proceeds under the Civil Rights Act in order to escape application of the exhaustion requirement sacrifices the protections available to him under the habeas corpus statute.

Habeas corpus is a flexible, efficient, summary mechanism for redressing extraordinary grievances and is an ideal remedy for reviewing prisoner claims which are almost universally instituted *pro se*. Because it is a summary remedy there is an emphasis on swift determination. *Peyton* v. *Rowe*, 391 U.S. 54, 63 (1968) ("a principle aim of the writ is to provide for swift judicial review of alleged unlawful restraints on liberty"). The habeas corpus timetable is as follows:

> "The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.
>
> * * *
>
> When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.
>
> * * *

> The court shall summarily hear and determine the facts, and dispose of the matter of law and justice require." (28 U.S.C. § 2243.)

Since the availability of the writ has been so dramatically expanded in recent years, good cause frequently is shown for a greater time for preparation for a habeas corpus hearing. Nonetheless, when the statute was amended in 1966 (Pub. L. 89-711, November 2, 1966), the time limits of 28 U.S.C. § 2243 remained intact.

In addition the statute imposes an affirmative duty of disclosure on the respondent:

> "(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination." (28 U.S.C. § 2254[e]).

Flexibility inheres in the fact that the District Court is empowered to dismiss applications which are frivolous on their face without even requiring a response by the respondent. The statute thereby satisfies the two overriding requirements in these cases—that non-meritorious claims be culled out as early as possible and that meritorious claims be considered as swiftly and completely as possible.

As this Court emphasized in *Harris* v. *Nelson*, 394 U.S. 286, 291 (1969):

> "The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected."

Consistently with this view of the writ's flexibility, this Court concluded in *Harris* that, although the discovery provisions of the Federal Rules of Civil Procedure are inapplicable to habeas corpus proceedings, "the courts may fashion appropriate modes of procedure [for securing facts], by analogy to existing rules or otherwise in conformity with judicial usage." 394 U.S. at 299. The inmate's right to secure information outside the record is thus protected by "the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." 394 U.S. at 300. See also *Townsend* v. *Sain*, 372 U.S. 293 (1963).

By contrast, the filing of a complaint under the Civil Rights Act initiates an original plenary civil action governed by the full panoply of the Federal Rules of Civil Procedure. Unlike habeas corpus, which under *Townsend* and *Harris* puts great responsibility for formulating the issues and ascertaining the facts upon the District Court, in an ordinary civil action the parties must formulate the issues and ascertain the facts with as little supervision from the Court as possible. The procedural formalities are far more complex.

For example, the rules of discovery are applicable (Federal Rules of Civil Procedure, Rules 26-37) and, in essence, serve one of the functions automatically served by

the exhaustion requirement of the habeas statute, *i.e.*, formulation and narrowing of issues for determination. Aside from creating a procedural problem for the typical *pro se* plaintiff, the discovery devices also afford an opportunity for abuse simply because incarcerated persons would be delighted by the prospect of requiring persons in authority to answer their questions and do their bidding. Even when a prisoner is represented by counsel in such a case, the relationship between the party and his attorney is such that counsel has less tactical control than in the ordinary civil litigation.

The potential for delay is one of the more significant disadvantages of allowing inmates the option of proceeding under the Civil Rights Act. Delay is occasioned, for example, by the use of "elaborate discovery procedures". *Harris* v. *Nelson*, 394 U.S. at 297. And, in general, delay inheres in the very way in which these cases are handled by this office and the courts. As a practical matter, when a *pro se* civil rights complaint is received the state most frequently serves and files an answer. After that the case will lie dormant, in some instances for years. This may be the result of the plaintiff's ignorance regarding the procedures for putting the case on the trial calendar or for moving for summary judgment. Or the delay may simply reflect the fact that the case has become part of the District Court's backlog of civil non-jury cases.*

Although these delays may be lessened by the computerized assignment of cases recently instituted in the Southern District, it is nevertheless true that the typical *pro se*

---

* Chief Judge David N. Edelstein of the United States District Court for the Southern District of New York in a speech before the New York County Lawyers Association, stated that, as of December 31, 1971 there was a backlog in the Southern District of 13,944 civil cases. New York Law Journal, February 3, 1972, page 1, col. 4.

application for habeas corpus is decided more expeditiously and with less of a burden on the applicant than is the typical civil rights action.

In view of the adequacy of the habeas corpus remedy as set forth in the statute and interpreted by this Court, equitable relief under the Civil Rights Act should be precluded in the area of prisoners' complaints relating to confinement just as it is where inmates challenge the validity of conviction and sentence. *Potwora* v. *Dillon*, 386 F. 2d 74 (2d Cir. 1967); *Wright* v. *McMann*, 387 F. 2d 519, 523 (2d Cir. 1967); *James* v. *Headly*, 410 F. 2d 325, 335 (5th Cir. 1969); *Appalachian Volunteers, Inc.* v. *Clark*, 432 F. 2d 530 (6th Cir. 1970), cert. denied 401 U.S. 939 (1971); *Gaito* v. *Ellenbogen*, 425 F. 2d 845, 848 (3d Cir. 1970); *Johnson* v. *Walker*, 317 F. 2d 418, 419-20 (5th Cir. 1963).

Respondents have never offered any substantial reason why claims of this nature are not properly treated as habeas corpus but throughout have simply relied upon their fears that if they are habeas corpus and the exhaustion requirement attaches they may never obtain review in the federal courts. That fear dealt with, *infra*, is a separate issue and is insufficient to defeat an otherwise valid classification.

Similarly, the appropriate classification of these cases should not depend upon whether the state provides an adequate damage remedy for alleged constitutional violations as respondents suggest at page 6 of their Brief in Opposition to the Petition for Certiorari. Not every prisoner action seeks damages, as the instant cases demonstrate. Moreover, the real concern of virtually every prisoner action alleging a constitutional violation—whether brought individually or by a class—is the removal of the violation:

"[M]oney damages are small consolation for a man serving a potentially long sentence and complaining of debasing prison conditions which he endured and

fears he might have to endure again." *Wright* v. *McMann*, 387 F. 2d 519, 523 (2d Cir. 1967).

A damage award—assuming that compensatory or punitive damages can be proved—is therefore relatively unimportant as compared with release from segregation, access to the courts, religious freedom, or fair administrative procedures, especially in view of the applicable limitations on recovery. See *Westberry* v. *Fisher*, 309 F. Supp. 12 (S.D. Me. 1970) (doctrine of sovereign immunity applicable). See also *Negrich* v. *Hohn*, 246 F. Supp. 173, 182 (W.D. Pa. 1965) ("[T]he right to bring a lawsuit against an impecunious policeman can scarcely be considered a complete and effective remedy").

There is thus no warrant in theory or practice for respondents' conclusion that an exhaustion requirement will "deprive prisoners of a federal forum and offer them little or nothing in return." Brief in Opposition to Petition, page 6. On the contrary, if an inmate obtains relief in the state courts by demonstrating a violation of his constitutional rights but there is no available state damage remedy, he may bring a civil rights action in federal court based upon his state court judgment. His primary interests will have been protected, the role of the state courts will have been preserved and the federal court will be relieved of separately determining the validity of the underlying claim.

If the state courts reject his claim on the merits and the inmate then seeks federal habeas corpus relief he must still prove his underlying claim as a predicate to obtaining damages. If he is able to do so he may then sue under the Civil Rights Act.

In either case, given the very limited number of successful claims for damages, any burden created by a separate civil rights action is outweighed by the other interests served by the exhaustion requirement. The state prisoner

is still better off with respect to recovering damages than his federal counterpart who may not sue federal authorities under the Civil Rights Act and is basically limited to recovering under the Federal Tort Claims Act for injuries resulting from ordinary negligence. *Muniz* v. *United States*, 374 U.S. 150 (1963).

The hollowness of respondents' damages argument demonstrates that the Civil Rights Act affords state prisoners no significant advantage in terms of remedy but only provides them with a vehicle for circumventing the exhaustion requirement when it suits their purposes. Until now the inmates' option has rested on assumption and not considered judicial decision. The dramatic increase in prisoner litigation requires that this option be foreclosed and state prisoners barred from choosing between two statutes having different prerequisites and different consequences. As Chief Judge Friendly correctly emphasized in his opinion below, the

> "right answer . . . is that, under the broad scope the Supreme Court has given to the 'Great Writ' as enacted by the Act of 1867, 14 Stat. 385, all state prisoner petitions complaining of the length or manner of custody, however phrased, are in fact petitions for habeas corpus . . ."

to which the exhaustion requirement of § 2254(b) is applicable (116-117a).

POINT II

Respondents have failed to exhaust their available and adequate State Court remedies.

Respondents Rodriguez, Katzoff and Kritsky never presented the state courts with an opportunity to review their claims. Therefore, they plainly failed to satisfy the exhaustion requirement of 28 U.S.C. § 2254(b). *Picard* v. *Connor*, 404 U.S. 270 (1971).

The statute provides that a failure to exhaust will be overlooked only where

> "there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

Respondents obviously cannot meet these exceptions. The State Supreme Court, a court of general jurisdiction which always sits in the same counties as the prisons and which ordinarily sits in the prisons themselves, reviews complaints by prisoners by way of habeas corpus and under Article 78 of the New York Civil Practice Law and Rules. In addition, Section 79-c of the Civil Rights Law (L. 1969, C. 658, eff. May 21, 1969), although not utilized because the doors to the federal courts are unconditionally open to inmates under the Civil Rights Act, provides a specific statutory remedy. All of these are special proceedings flexible enough to respond to the exigencies of fact finding in the particular case. See, e.g., *People ex rel. Keitt* v. *McMann*, 18 N Y 2d 257 (1966); *Shaw* v. *McGinnis*, 14 N Y 2d 864 (1964); *Marcelin* v. *Scott*, 33 A D 2d 588 (3rd Dept. 1969). See also *Matter of Brown* v. *McGinnis*, 10 N Y 2d 531 (1962). These state judicial remedies were found to be adequate and available by the three dissenting judges below and by Judge Mansfield as well. No member of the Court made a finding to the contrary. Contrast *Wilwording* v. *Swenson*, 404 U.S. 249 (1971) where it was clear from the record that the Missouri courts do not review claims by state prisoners regarding the conditions of their confinement.

Despite the existence of these remedies respondents claimed below that they should be excused from the mandate of 28 U.S.C. § 2254(b) on the ground that application of the exhaustion requirement will effectively bar federal review of good time cases. This argument is based on the time sequence used by the State in finally determining that

good time will be withheld. Under the new regulations established by the New York Department of Correctional Services each inmate's file

> "shall be considered not more than three nor less than two months before the earliest possible date he would be entitled to consideration for parole or conditional or other release if that date depends upon the amount of good behavior allowance to be granted based upon the assumption that he has earned all good behavior allowances that can be granted." 7 N.Y. Code, Rules and Regulations, § 261.3(b).*

Implicit in respondents' argument is their assumption that the state courts will not afford speedy relief in a proper case. However, 28 U.S.C. § 2254(b) makes exactly the opposite assumption unless and until an applicant can make out a case to the contrary and, significantly, appellees have completely failed to do this. See *Mitchell* v. *Rabenfield*, 285 F. Supp. 728, 731 (D.C. Md. 1968).

Moreover, it is far from clear that the already crowded federal courts are in a position to act any more expeditiously than the state courts in protecting the rights involved. The following are the time schedules in the instant cases:

Rodrigues

Disciplinary Hearing	—October 30, 1968
Determination by Prison Commutation Board	—July, 1969
Action Initiated	—September 25, 1969
Alleged Release Date	—October 10, 1969
District Court Decision	—December 23, 1969

*The regulations in effect when the instant actions were commenced provided for review "[a]t least one month prior to the expiration of the minimum or maximum term, less all possible reductions . . ." 7 N.Y.C.R.R. § 60.1(d) (repealed October 19, 1970). The present regulations governing good conduct time allowances are set forth as Exhibit "B" of this brief.

Kritsky

Disciplinary Hearing	—March, 1962
Determination by Prison Commutation Board	—October, 1968
Action Initiated	—August 6, 1969
Alleged Release Date	—February 16, 1970
District Court Decision	—June 12, 1970

Katsoff

Disciplinary Hearing	—January 9, 1969
Determination by Prison Commutation Board	—February 11, 1970
Action Initiated	—July 29, 1970
Alleged Release Date	—June 14, 1970
District Court Decision	—August 18, 1970

In both *Rodrigues* and *Kritsky* which were initiated before the conditional release dates in issue a decision on the merits by the District Court was not reached until well after those dates had passed. *Kritsky* was decided by the District Court more than 10 months after it was initiated. Only in *Katsoff* was there a speedy determination and the action there was not initiated until *after* the date on which Katsoff claimed he was entitled to release.*

There is no evidence that the state courts would act any less expeditiously than the federal courts with respect to these claims and, as Judge Mansfield emphasized, there is good reason to believe they can act even more quickly because of their location and the general practice whereby State Supreme Court judges actually sit in the institutions to hear prisoner claims.

---

* Katsoff alleged that he did not learn of his legal rights until shortly before he initiated his action. There is no similar allegation in the other cases although Kritsky testified he was uncertain of his rights at the time of his *original* disciplinary hearing. He never explained why he waited ten months after the final determination of the Prisoner Commutation Board to act.

The State's procedure of finally reviewing an inmate's record in the institution shortly before the earliest release date possible is not simply a matter of administrative convenience. Rather, it serves the important correctional purpose of allowing each inmate to demonstrate by his good behavior that any previous infraction will not make him a risk to society. To carve out an exception to the exhaustion requirement and thereby deprive the State of an opportunity to review these cases solely because of the time element involved would be to penalize the State for adopting a sound correctional procedure. Furthermore, if the time element is sufficient to excuse exhaustion of state judicial remedies it presumably would also obviate the need for state inmates to utilize the new administrative review procedures recently implemented by the State (7 N.Y. Code, Rules and Regulations, Part 270) in contrast with their federal counterparts. See *Smoake* v. *Willingham*, 359 F.2d 386 (10th Cir. 1966); *United States ex rel. Weyrauch* v. *Parker*, 268 F. Supp. 785 (M.D. Pa. 1967).

Finally, an exception to the exhaustion requirement such as respondents have argued for would logically extend to state prisoners who wish to challenge the constitutionality of a conviction which carries a short sentence. Heretofore such prisoners have been required to satisfy the exhaustion requirement. *Mitchell* v. *Schoonfield*, 285 F. Supp. 728 (D.C. Md. 1968); *Iles* v. *Ellis*, 264 F. Supp. 185 (S.D. Ind. 1967); *United States ex rel. Zevin* v. *Cahn*, 282 F. Supp. 275 (E.D.N.Y. 1968); *Minnesota* v. *Brundage*, 180 U.S. 499, 503 (1901). But see *Ex Parte Kieffer*, 40 F. 399 (C.C.D. Kan. 1889).

In any event, where, as in these cases, the allegedly improper disciplinary proceeding not only results in a good time assessment but also causes the inmate to be placed in segregation, the time problem does not exist. Upon exhausting his administrative remedies the inmate has a ripe cause of action based upon his confinement in segregation just as he would if he were challenging the conditions of segregation *per se*.

Respondents' argument that application of the exhaustion requirement will deprive them of a federal forum not only assumes that state courts will be dilatory but also presupposes that state judges will not be responsive to their claims. In fact, respondent Katzoff made the surprising argument that "state courts are not very sympathetic to prisoners' cases as indeed they are not to so many constitutional claims." Brief for Respondent Katzoff On Rehearing *En Banc*, page 38. However, after making the generalization respondent failed to support it.

Aside from several unfavorable cases dating from the early 1960's, respondent Katzoff merely cited a handful of recent unreported memorandum-decisions dismissing applications which apparently were never appealed. At the same time respondent acknowledged that in *Brabson* v. *Wilkins*, 19 N.Y. 2d 449 (1971) and *People ex rel. Menechino* v. *Warden*, 27 N.Y. 2d 449 (1971) the New York Court of Appeals had ruled favorably on claims relating to censureship and representation by counsel at parole revocation hearings. Respondent might also have cited *People ex rel. Brown* v. *Johnston*, 9 N.Y. 2d 482 (1961) and *Matter of Brown* v. *McGinnis*, 10 N.Y. 2d 531 (1962) decided by the Court of Appeals. In the former the Court held that habeas corpus lies to challenge the place of confinement. The latter directed the Commissioner of Correction to permit free exercise of religion.*

It is evident that generalizations about the lack of sympathy of New York judges are unwarranted, particularly since the Courts of New York have shown themselves consistently responsive to changes in constitutional interpretation—even when changes in the law have required them to review and reverse their *own* proceedings.

---

* In addition, the State submitted to the Circuit Court a group of unreported decisions gathered from files of this office throughout the State granting relief to prisoners raising all types of claims. Significantly, in many of the cases the inmates were represented by counsel.

See, e.g., People v. *Huntley*, 15 N.Y. 2d 72 (1965) (dec'd. in light of *Jackson* v. *Denno*, 378 U.S. 368 [1964]); *People* v. *Kessler*, 17 N.Y. 2d 174 (1966) (dec'd. in light of *United States ex rel. Hetenyi* v. *Wilkins*, 348 F. 2d 844 [2d Cir. 1965], *cert. denied sub nom. Mancusi* v. *Hetenyi*, 383 U.S. 913); *People* v. *Cornish*, 21 A.D. 2d 280 (1st Dept. 1964) (dec'd. in light of *United States ex rel. La Near* v. *LaVallee*, 306 F. 2d 417 [2d Cir. 1962]); *People* v. *Bonino*, 1 N.Y. 2d 752 (1956) (dec'd. in light of *United States ex rel. Caminito* v. *Murphy*, 222 F. 2d 698 [2d Cir. 1955]).

In any event, a claim that state prisoners receive a more favorable reception in the federal courts, no matter how unwarranted, has no place in the consideration of the requirement for exhaustion in the state courts. So long as the state courts provide a ready remedy in *these* cases, this Court should not be diverted by any captious assessment of the result reached in a particular case decided by a state court any more than it would be by the result in a case decided in the District Court.

CONCLUSION

For all the foregoing reasons, the decision below should be reversed.

Dated: New York, New York, September 8, 1972.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Petitioners

Samuel A. Hirshowitz
First Assistant Attorney General

Lillian Z. Cohen
Assistant Attorney General
of Counsel

The State of New York has been authorized by the Attorneys General of the following states to list them as joining with us in our brief on the merits.

Honorable William J. Baxley	Alabama
Honorable Ray Thornton	Arkansas
Honorable Gary K. Nelson	Arizona
Honorable Evelle J. Younger	California
Honorable Robert K. Killian	Connecticut
Honorable Robert L. Shevin	Florida
Honorable Arthur K. Bolton	Georgia
Honorable Theodore L. Sendak	Indiana
Honorable Vern Miller	Kansas
Honorable William J. Guste, Jr.	Louisiana
Honorable James E. Erwin	Maine
Honorable Francis B. Burch	Maryland
Honorable Robert L. Woodahl	Montana
Honorable Clarence A. H. Meyer	Nebraska
Honorable Robert List	Nevada
Honorable Richard J. Israel	Rhode Island
Honorable Daniel R. McLeod	South Carolina
Honorable Crawford C. Martin	Texas
Honorable Vernon B. Romney	Utah
Honorable Chauncey H. Browning, Jr.	West Virginia

EXHIBIT "A"

Order.

STATE OF SOUTH CAROLINA,

COUNTY OF RICHLAND.

COURT OF GENERAL SESSIONS

CARL SELLERS, ROBERT LAMBERT, WAYNE WALKER, DANNY GRIFFIN and DAN BELL, JR.,

Petitioners,

vs.

THE STATE OF SOUTH CAROLINA,

Respondent.

This matter came before me on the petition of Carl Sellers, Robert Lambert, Wayne Walker, Danny Griffin and Dan Bell, Jr. seeking relief from action of the Adjustment Committee of the Central Corrections Institution which as a result of hearings held on October 8, 1971 by that committee, revoked all good time of the petitioners and segregated the petitioners from the remainder of the prison population by placing the petitioners in the maximum security section of the Central Corrections Institution.

All the petitioners were present and represented by counsel, and the court heard the testimony of all the petitioners and other witnesses presented by the petitioners and by the State of South Carolina.

From the testimony of the State's witnesses, Jessie W. Strickland, Warden, Central Corrections Institution and George Martin, Deputy Warden, Central Corrections Institution, it appears:

Exhibit "A"

That the officials at the Central Corrections Institution first learned of the offenses allegedly committed by Carl Sellers, Robert Lambert, Wayne Walker, Danny Griffin and Dan Bell, Jr. from a fellow inmate of the petitioners from whom a statement was taken by prison officials and acting on this statement further investigation was undertaken by the above named deputy warden, George Martin and Chief H. L. Williams, Chief Correctional officer of the Central Correctional Institution; and

That this further investigation consisted of approaching other inmates and soliciting further statements implicating the petitioners; and

That once the investigation had reached the point where charges were placed against the petitioners, the petitioners were given written notice that they were charged with the crime of assault and rape of an inmate or inmates at some time prior to September 23, 1971 in various parts of cell block #1; and

That neither the times, places, dates or the names of victims were furnished to the petitioners and that at no time were they allowed outside their cells in order to conduct any investigation into the charges placed against them; and

That on October 8, 1971, the petitioners were individually brought before the Adjustment Committee for a hearing and that a member of the Committee was Deputy Warden, George Martin, who had participated in the investigation, and that Chief Correctional Supervisor, H. L. Williams, who had carried the main brunt of the investigation of the charges was present both during the hearing and during the decision-making process following the hearing; and

That the hearing and decision-making process were summary in nature and lasted no more than 10 to 15 minutes at the most for each petitioner involved; and

That witnesses Strickland and Martin testified that the danger of retribution against the inmates who had impli-

Exhibit "A"

ated the petitioners was so great that it was necessary that their names be kept from the petitioners even though at the time of the hearing all of the inmates who had given statements against the petitioners were either released into society or were in another prison facility geographically separate from the Central Correctional Institution where the petitioners were incarcerated.

Therefore, I find that the uncontroverted testimony of both the witnesses for the state and of the Petitioners vividly demonstrates that the petitioners were not allowed even minimal procedural safeguards in a hearing that could result and did result in the loss of statutory good time they had acquired prior to the alleged offenses, as well as indefinite segregation in the maximum security portion of the prison; and

That the petitioners are given by statute the right to acquire early release through acquisition of good time and that by statute the director of the Central Corrections Institution has within his discretion the right to take away statutory good time.

However, discretion can be abused, and I find and conclude that the procedure described by the petitioners and by the witnesses for the state demonstrates that a "star chamber" atmosphere pervaded the entire investigation and hearings of the Adjustment Committee, and further, that the danger of retribution against the victims and informants feared by the prison officials was not sufficient justification for the complete deprivation of procedural safeguards to which the petitioners are entitled.

However, I find that the restrictions imposed upon these petitioners by the Adjustment Committee by placing them in administrative segregation were within the power of the Adjustment Committee to maintain order, discipline and security; and

Further, I find that the action of the Adjustment Committee with the respect of the loss of the good time im-

posed upon the petitioners, Carl Sellers, Robert Lambert, Wayne Walker, and Danny Griffin was taken without minimal procedural protection for the petitioners; and it is therefore

ORDERED that petitioners earned good time, as provided by statute be, and hereby is, restored to the Petitioners, Carl Sellers, Robert Lambert, Wayne Walker and Danny Griffin. Petitioner Dan Bell, Jr. is not affected by this order since at the time of the alleged offense and at the time of the Adjustment Committee hearing he had not accrued any good time, having lost it for a previous infraction.

IT IS SO ORDERED.

s/ John Grimbal
JOHN GRIMBALL
Judge, 5th Judicial Circuit

Columbia, South Carolina
February 1, 1972.

Attest:
A True Copy

John R. T. Mayer
G.C.G.F. & G.S.
JG

EXHIBIT "B"

Part 261, Time Allowance Committees.

Historical Note

Part (§§ 261.1-261.3) added, filed Sept. 17, 1970 eff. Oct. 19, 1970.

Section 261.1. Establishment of time allowance committees. (a) There shall be in each correctional facility a committee to be known as the "time allowance committee".

(b) Such committee shall consist of: the deputy superintendent of the facility; the person in charge of industries therein; the person in charge of education therein; and the physician. In a facility where it would be impracticable to have a committee so composed, the superintendent shall apply to the commissioner for an order designating the composition of the committee. Where a member of a time allowance committee is unable to attend a meeting, the employee who would normally assume his duties shall be his alternate and shall act in his place.

(c) Each such committee shall have a chairman designated by the superintendent from among the members and the chairman shall be responsible for the proper operation of the committee.

261.2 Role of time allowance committees. The purpose of the time allowance committee shall be to make recommendations as to the amount of good behavior allowance to be granted to inmates who are eligible to be considered for such allowance.

261.3 Procedure of time allowance committees. (a) The file of each inmate who is serving an indeterminate sentence and who is entitled to be considered for good behavior allowance shall be considered at least once in each three

year period during the time of his incarceration, and for this purpose all jail time and other credits against the sentence shall be calculated as part of the first three year period, or where the incident leading to the credit occurs at a subsequent time the credit shall be calculated as part of the first three year period following the occurrence of such incident.

(b) Irrespective of when the last consideration of the file of an inmate serving an indeterminate sentence may have occurred, the file of each such inmate shall be considered not more than three nor less than two months before the earliest possible date he would be entitled to consideration for parole or conditional or other release if that date depends upon the amount of good behavior allowance to be granted (based upon the assumption that he has earned all good behavior allowances that can be granted). In any case where the triennial review required by subdivision (a) of this section would occur within 12 months of the review required by this subdivision (b), the triennial review need not be conducted.

(c) Where an inmate is serving a definite sentence of imprisonment with a term of one year or less, the committee shall review his file not more than six nor less than two weeks before the earliest possible date he would be entitled to release (based upon the assumption that he has earned all good behavior allowances that can be granted).

(d) The commitee shall consider the entire file of the inmate and shall interview the inmate and then shall decide upon a recommendation as to the amount of good behavior allowance to be granted, applying the principles set forth in sections 260.3 and 260.4 of this Part.

(e) The committee shall not recommend the granting of the total allowance authorized by law or the withholding of any part of the allowance in accordance with any auto-

Exhibit "B"

matic rule, but shall appraise the entire institutional experience of the inmate and make its own determination.

(f) The committee shall promply report the results of its deliberations in writing to the superintendent. Such report shall set forth its recommendation for the time to be allowed for the period under consideration and the reasons for the recommendation.

(g) Where time has been declared lost in a determination of a superintendent's proceeding, such time shall be excluded from the amount the committee is authorized to recommend for allowance, but on the last consideration to occur before the earliest parole or conditional or other release date, the committee shall consider whether, and set forth its recommendation as to whether the inmate's subsequent behavior merits restoration of all or part of the lost allowance and its reasons therefor.

(h) All recommendations of the committee shall be pursuant to a decision of a majority of the members, but any member who disagrees shall note his recommendations and the reasons therefor on the report of the committee. Where a majority of the members are unable to agree upon a recommendation, the chairman shall report such fact and each member shall report his recommendation and his reasons in the report made by the chairman.